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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

VIOLET BLUE, an individual,

Plaintiff/Counterclaim Defendant,

vs.

ADA MAE JOHNSON et al.,

Defendant/Counterclaim Plaintiff.

Case No.: C 07-5370 MJJ

**DEFENDANT WOFFINDEN'S RESPONSE
IN OPPOSITION TO PLAINTIFF'S
MOTION FOR SANCTIONS
AND RELATED MOTIONS**

Hon. Martin J. Jenkins
Courtroom 11, 19th Floor
450 Golden Gate Avenue
San Francisco, CA 94102

Hearing Date: March 04, 2008

Hearing Time: 9:00 AM

I. RESPONSE IN OPPOSITION

Plaintiff, Violet Blue, has moved this Honorable Court to assess against Defendant Ada Mae Woffinden *nee* Johnson costs in the amount of \$4,123 for the preparation and filing of Plaintiff's motion to amend the complaint and accompanying papers, and \$2,208 for Plaintiff's Motion For

1 Sanctions (“Motion”).

2 In her Motion, Plaintiff argues that on December 5, 2007, Plaintiff’s counsel contacted
3 Defendant’s counsel seeking agreement to the filing of Plaintiff’s Amended Complaint. *Motion at*
4 *2:14-21*. Defendant’s counsel does not dispute this representation. Rather, Defendant’s counsel
5 candidly admits that Plaintiff’s counsel contacted him on the very date this Honorable Court granted
6 Defendant’s counsel’s application for admission *pro hac vice* into this case. *Declaration of Robert S.*
7 *Apgood in Support of Defendant Woffinden’s Response in Opposition to Motion for Sanctions*
8 (“Apgood Decl.”) at ¶¶ 4-7.

9 When Plaintiff’s counsel, Ms. Vogele, contacted Defendant’s counsel, Mr. Apgood, Mr.
10 Apgood had not yet had the opportunity to fully review the file and pleadings in the case, and thus was
11 not adequately informed about the case to fully apprise the Defendant of the potential pros and cons of
12 agreeing to the filing of an amended complaint by the Plaintiff. *Id.* at ¶ 8. Consequently, Mr. Apgood
13 refused to agree to the filing of the amended complaint. *Id.* At ¶ 9.

14 Moreover, when Mr. Apgood refused on December 5, 2007 to agree to the filing of the
15 amended complaint, he had serious questions whether there were sufficient minimum contacts with
16 this forum for this Honorable Court to exert *in personam* jurisdiction over the Defendant, and whether
17 venue was properly found in this district. *Id.* at ¶ 10. Both of these reasons were explained to Ms.
18 Vogele during the course of the telephonic conversation on December 5, 2007, which Plaintiff
19 overlooks in the factual recitation in her Motion and in the Declaration of Ms. Colette Vogele made in
20 support thereof. *Id.*

21 Additional reasonable justification for refusing to agree to the filing of the amended complaint
22 existed in Defendant’s counsel’s mind, the substance of which Defendant respectfully declines to
23 examine in detail in this response as, to do so, would reveal theories of the case that are protected by
24 the attorney-client privilege. Nevertheless, Defendant’s counsel will gladly make full disclosure *in*
25 *camera* to this Honorable Court in order that this Honorable Court may make an informed
26 determination of the sufficiency of Defendant’s non-divulgence, as well as to consider the merits of

1 those reasons in determining its ruling on this Motion. *Id.* at ¶ 11.

2 Plaintiff filed her Motion For Leave To File An Amended Complaint on January 2, 2008. Dkt.
3 # 23.

4 On January 17, 2008, this Honorable Court issued its Order to Show Cause to the Defendant
5 for failure to timely file an opposition or statement of non-opposition to Plaintiff's Motion For Leave
6 To File An Amended Complaint. Dkt. # 17. In response to the Order, counsel for the Defendant filed
7 Defendant's Statement of Non-opposition (Dkt. # 21) concurrent with the Defendant's response to the
8 Order to Show Cause (Dkt. # s 19, 20). At that time, the Defendant determined that her interests
9 would not be prejudiced by not opposing Plaintiff's Motion For Leave To File An Amended
10 Complaint. While discussion of those reasons here would require the divulgence of theories of the
11 defense in this case protected by the attorney-client privilege, Defendant's counsel will fully make *in*
12 *camera* disclosure to this Honorable Court in order that this Honorable Court may make an informed
13 determination of the sufficiency of Defendant's non-divulgence, as well as to consider the merits of
14 those reasons in determining its ruling on this Motion. *Id.* at ¶¶ 13-14.

15 Federal Rule of Civil Procedure No. 15 states, in relevant part:

16 Rule 15. Amended and Supplemental Pleadings

17 (a) *Amendments Before Trial.*

18 (1) Amending as a Matter of Course.

19 A party may amend its pleading once as a matter of course:

20 (A) before being served with a responsive pleading; or

21 (B) within 20 days after serving the pleading if a responsive
22 pleading is not allowed and the action is not yet on the trial
23 calendar.

24 (2) Other Amendments.

25 In all other cases, a party may amend its pleading only with the opposing
26 party's written consent or the court's leave. The court should freely give
leave when justice so requires.

Plaintiff filed her original complaint on October 22, 2007. Defendant filed her *pro se* answer
on November 13, 2007. As noted *supra*, Plaintiff requested that Defendant agree to the filing of the
amended complaint on December 5, 2007, 21 days after Defendant filed her *pro se* answer. Nothing

1 in the Rule requires the non-moving party to agree to the filing of an amended pleading under penalty
2 of sanctions if that party does not ultimately oppose the filing of the pleading. Yet, this is precisely
3 how the Plaintiff asks this Honorable Court to hold. In her Motion, Plaintiff states without
4 equivocation that Defendant's non-opposition to Plaintiff's Motion For Leave To File An Amended
5 Complaint, and "subsequent filing of a Notice of Non-opposition amounts to an improper delay
6 tactic." Motion at 4:3-5. Plaintiff further argues that "[i]n refusing consent and failing to oppose
7 Plaintiff's motion, the Defendant's Notice of Non-opposition was submitted for the improper purposes
8 of causing unnecessary delay and needlessly increasing the cost of litigation." Motion at 4:19-21.
9 Plaintiff argues this despite this Honorable Court's holding that "[t]he Court further finds that the
10 declaration submitted by Defendant's counsel sufficiently explains the circumstances that led to
11 Defendant's failure to comply with the local rules and to timely respond to the Motion. The Court is
12 persuaded that there is little risk that the problem will be repeated, and finds that sanctions are
13 inappropriate." Dkt. # 22. Moreover, Defendant's counsel averred that none of these reasons, nor any
14 nefarious reason, was the impetus to neither oppose the motion, nor file a Notice of Non-opposition.
15 *See, Declaration of Robert S. Apgood*, Dkt. # 20.

16 At no times were Defendant's counsel's refusals to agree to the filing of the amended
17 complaint made in bad faith. *Apgood Decl.* at ¶ 15.

18 The decision to not *agree* to the amended complaint was not made for the purpose of
19 vindictiveness, improper purpose, to cause delay to the orderly proceeding of the lawsuit, obduracy, or
20 to increase the costs of the litigation. *Id.* at ¶ 16.

21 The decision to not *oppose* to the amended complaint was not made for the purpose of
22 vindictiveness, improper purpose, to cause delay to the orderly proceeding of the lawsuit, obduracy, or
23 to increase the costs of the litigation. *Id.* at ¶ 17.

24 At no time did Defendant's counsel act with a knowing and reckless disregard for Fed. R. Civ.
25 P. 1. *Id.* at ¶ 18

26 Defendant's counsel's reasons for the late filing of the Statement of Non-opposition have

1 previously been explained to this Honorable Court. *See, Declaration of Robert S. Apgood*, Dkt. # 20.
2 As a result, this Honorable Court determined that those reasons were sufficient, that the error was not
3 likely to recur, and that sanctions are not appropriate (Dkt. # 22).

4 Other than Plaintiff's conclusory statements that Defendant and/or Defendant's counsel acted
5 in bad faith, acted with the purpose of vindictiveness, with improper purpose, to cause delay to the
6 orderly proceeding of the lawsuit, obduracy, and to increase the costs of the litigation, Plaintiff offers
7 no evidence in support of those claims and certainly nothing to disprove or adequately refute the
8 evidence that was before this Honorable Court *prior to* Plaintiff bringing this Motion, and as is put
9 before this Honorable Court contemporarily with this opposition that Defendant's action and/or
10 inaction was done with malice.

11 Moreover, Plaintiff misstates the plain language of Fed. R. Civ. P. 15 when she argues that
12 "[r]elying on the Ninth Circuit's guidance, sanctions should be imposed on Defendant's Counsel here
13 under [28 U.S.C. §] 1927 for his refusal to consent to Plaintiff's amended complaint as authorized
14 'when justice so requires', by Rule 15 of the Federal Rules of Civil Procedure." (quoting Fed. R. Civ.
15 P. 15(a)(2)). Plaintiff's argument appears to be that the Rule imposes a duty on the non-moving party
16 "when justice so requires." However, that is *not* what the Rule states. Rather, the Rule
17 unambiguously states that, when a movant seeks the filing of an amended pleading, "[t]he *court* should
18 freely give leave 'when justice so requires.'" Fed. R. Civ. P. 15(a)(2)(emphasis added). The Rule is
19 not dictating a standard for opposition or non-opposition by the non-moving party. Rather, the Rule
20 states a precatory aspiration for the court in considering a motion seeking the filing of an amended
21 pleading.

22 Plaintiff argues that Defendant's counsel acted with a "knowing and reckless disregard for
23 Rule 1 of the Federal Rules of Civil Procedure" which "requires Defendant's Counsel to construe the
24 [Federal Rules of Civil Procedure] with an eye toward as just, speedy, and inexpensive determination
25 of every proceeding." *Motion* at 5:14-17. By not opposing Plaintiff's Motion For Leave To File An
26 Amended Complaint, Plaintiff argues, Defendant's counsel was "reckless" and that that "recklessness

1 ultimately multiplied the proceedings by forcing Plaintiff to file the Motion to Amend the Complaint
2 and supporting papers.” *Id.* at 5:17-19. Plaintiff argues that, by Defendant’s counsel’s refusing to
3 agree to the filing of the Amended Complaint, Defendant’s counsel also acted in bad faith. While
4 Plaintiff makes a succinct series of recitations of potential sanctions that may be imposed against an
5 attorney who acts recklessly and/or in bad faith, Plaintiff fails to articulate precisely what conduct of
6 Defendant’s counsel constitutes such recklessness and/or bad faith. Indeed, the only argument that
7 sets forth any inkling of a basis for damage to the Plaintiff is Plaintiff’s unsubstantiated, and unsworn
8 representation that, had Defendant agreed to the filing of the amended complaint, “Plaintiff would not
9 have expended resources preparing the motion to amend and the supporting documents...” *Motion* at
10 4:16-17. Defendant reasonably interprets this representation to mean, essentially, that Plaintiff would
11 not have as comprehensively pleaded its case for the admission of the amended complaint as it did had
12 Defendant acquiesced to Plaintiff’s request, notwithstanding the plain-language requirement of Fed. R.
13 Civ. P. 15 *requirement* to seek leave of the court by motion for the admission of any amended pleading
14 to which the non-movant has not agreed (and for which there is no duty on the part of the non-movant
15 to so agree). Clearly, since Defendant had filed her answer to Plaintiff’s complaint, Plaintiff was
16 compelled by the plain language of the Rule to seek leave of the Court to file the amended complaint.

17 Aside from this Honorable Court’s Order to Show Cause (of which this Honorable Court has
18 disposed, and which is not now before the Court), the *only* proceeding in this case that has not been
19 required by rule, court order, or the normal course of pleadings, is Plaintiff’s instant Motion, which
20 necessarily also implicates Defendant’s response in opposition, Plaintiff’s reply, if any, this Honorable
21 Court’s consideration of the pleadings and argument of counsel, and the Court’s ruling on Plaintiff’s
22 Motion. Moreover, as a direct result of Plaintiff filing her Motion and noticing it for hearing on March
23 4, 2008, additional pleadings to continue the hearing date of the Motion were necessitated due to
24 Defendant’s counsel being scheduled in trial for the week of March 3, 2008 and possibly carrying over
25 into the week of March 10, 2008. Additionally, costs to both the Plaintiff and Defendant are increased
26 in no insignificant amount by this Motion and by requiring counsel for both parties to travel to the

1 court to argue the Motion.

2 For all of these reasons, Plaintiff's Motion must be DENIED.

3 4 **II. DEFENDANT'S MOTIONS**

5 In Plaintiff's Motion, Plaintiff argues that Defendant's refusal to consent to Plaintiff's
6 amendment to the Complaint on the grounds that Defendant was going to oppose the amendment, and
7 subsequent filing of a Notice of Non-opposition amounts to an improper delay tactic. *Motion* at 4:3-5.
8 Plaintiff's allegations are legal conclusions for which Plaintiff provides no foundation, either by the
9 offer of tangible evidence, or by declaration. Defendant therefore MOVES TO STRIKE all references
10 in Plaintiff's Motion that state that Defendant's filing of a Notice of Non-opposition is an improper
11 delay tactic.

12 In Plaintiff's Motion, Plaintiff argues that Defendant's Notice of Non-opposition was filed in
13 bad faith. *Motion* at 4:5-9. Plaintiff's allegations are legal conclusions for which Plaintiff provides
14 no foundation, either by the offer of tangible evidence, or by declaration. Defendant therefore
15 MOVES TO STRIKE all references in Plaintiff's Motion that state that Defendant's filing of a Notice
16 of Non-opposition was done in bad faith.

17 In Plaintiff's Motion, Plaintiff argues that Defendant's filing her Notice of Non-opposition was
18 gamesmanship. *Motion* at 4:25-27. Plaintiff's allegations are legal conclusions for which Plaintiff
19 provides no foundation, either by the offer of tangible evidence, or by declaration. Defendant
20 therefore MOVES TO STRIKE all references in Plaintiff's Motion that state that Defendant's filing of
21 her Notice of Non-opposition was gamesmanship.

22 In Plaintiff's Motion, Plaintiff argues that sanctions should be imposed on Defendant's counsel
23 under 28 U.S.C. § 1927 for his refusal to consent to Plaintiff's amended complaint. *Motion* at 5:11-14.
24 In support of her argument, Plaintiff misstates the plain language of Fed. R. Civ. P. 15(a)(2).
25 Plaintiff's allegations are legal conclusions for which Plaintiff provides no foundation, either by the
26 offer of tangible evidence, or by declaration. Defendant therefore MOVES TO STRIKE all references

1 in Plaintiff's Motion that state that Defendant's counsel's refusal to consent to Plaintiff's amended
2 complaint violates Fed. R. Civ. P. 15 and that, as a result, Defendant's counsel is liable for sanctions
3 under 28 U.S.C. § 1927.

4 In Plaintiff's Motion, Plaintiff argues that in refusing consent to agree to Plaintiff's filing of her
5 amended complaint, Defendant's counsel acted with knowing and reckless disregard for Fed R. Civ. P.
6 1. *Motion* at 5:14-17. Plaintiff's allegations are legal conclusions for which Plaintiff provides no
7 foundation, either by the offer of tangible evidence, or by declaration. Defendant therefore MOVES
8 TO STRIKE all references in Plaintiff's Motion that Defendant's counsel's refusal to consent to
9 Plaintiff's amended complaint was a knowing and reckless disregard for Fed. R. Civ. P. 1.

10 In Plaintiff's Motion, Plaintiff argues that Defendant's counsel acted in bad faith by
11 withholding consent to allow the filing of Plaintiff's First Amended Complaint and subsequently
12 submitting Defendant's Notice of Non-opposition, all for the purpose of harassing Plaintiff by
13 delaying litigation and increasing costs. *Motion* at 5:20 – 6:4. Plaintiff's allegations are legal
14 conclusions for which Plaintiff provides no foundation, either by the offer of tangible evidence, or by
15 declaration. Defendant therefore MOVES TO STRIKE all references in Plaintiff's Motion that
16 Defendant's counsel acted in bad faith by withholding consent to allow the filing of Plaintiff's First
17 Amended Complaint and subsequently submitting Defendant's Notice of Non-opposition, all for the
18 purpose of harassing Plaintiff by delaying litigation and increasing costs.

19 Defendant Ada Mae Woffinden *nee* Johnson respectfully MOVES THIS HONORABLE
20 COURT to find that it is Plaintiff's Motion For Sanctions that has unreasonably and vexatiously
21 multiplied the proceedings in this matter, and to issue an Order appropriately sanctioning Plaintiff's
22 counsel for her participation in the unreasonable and vexatious multiplication of the proceedings,
23 including such monetary sanctions as the Court deems just, to be paid to a charitable organization of
24 the Court's choosing.

25 Defendant Ada Mae Woffinden *nee* Johnson respectfully MOVES THIS HONORABLE
26 COURT to find that Plaintiff's Motion For Sanctions is frivolous, and to issue an Order directing

1 Defendant to submit to the Court a Bill of Costs and Fees suffered in defending this Motion for
2 consideration by this Honorable Court for an award thereon.

3
4 DATED THIS 12th day of February 2008.

5 Respectfully submitted,

6 CARPELAW PLLC

7 /s/ Robert S. Apgood

8 Robert S. Apgood, *Pro Hac Vice*

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DECLARATION OF SERVICE

I, Robert S. Apgood, hereby make the following Declaration from personal knowledge that on February 12, 2008, I served the foregoing

1. Defendant Woffinden's Response in Opposition To Plaintiff's Motion For Sanctions and Related Motions;
2. Proposed Order Granting Defendant's Motions To Strike and For Sanctions; and
3. this certificate of Service

by filing a copy thereof with Clerk of the Court via the Court's CM-ECF system. As a result of their agreement and the court's rule, the following will be notified of this filing and copies of the documents will be made available to them:

Colette Voge
Benjamin Costa
Vogele & Associates
12 Geary Street, Suite 701
San Francisco, CA 94108

I herby declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

EXECUTED this 12th of February 2008 at Seattle, Washington.

CARPELAW PLLC

s/ Robert S. Apgood
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